United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6008,6013,1028

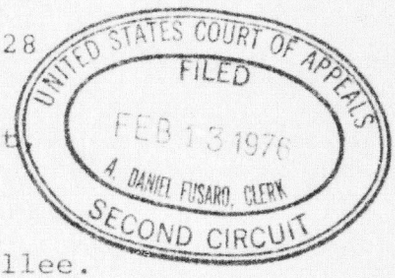
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 76-6008, 76-6013, 76-1028

AMREP CORPORATION, Appellant,

v.

FEDERAL TRADE COMMISSION, Appellee.



UNITED STATES OF AMERICA,

v.

AMREP CORPORATION, et al., Defendants,

FEDERAL TRADE COMMISSION, Cross-Appellant.

On Appeal from the United States District
Court for the Southern District of New York

BRIEF FOR FEDERAL TRADE COMMISSION
APPELLEE and CROSS-APPELLANT

ROBERT J. LEWIS
General Counsel

GERALD P. NORTON
Deputy General Counsel

GERALD HARWOOD
Assistant General Counsel

D. BARRY MORRIS
CHARLES F. PLATT
Attorneys

Attorneys for the Federal Trade Commission

Washington, D.C. 20580

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BRIEF FOR FEDERAL TRADE COMMISSION APPELLEE AND CROSS-APPELLANT

STATEMENT OF ISSUES

1. Whether the District Court in the civil case abused its discretion in denying Amrep's motion for a stay of a lawful and ongoing Federal Trade Commission administrative proceeding pending the conclusion of a criminal trial involving Amrep.

2. Whether the District Court in the criminal case abused its discretion by permitting the Federal Trade Commission proceeding to continue until July 30, 1976.

3. Whether the District Court in the criminal case abused its discretion by not allowing the Federal Trade Commission proceeding to continue after July 30, 1976, but instead ordering that the FTC proceeding be stayed from that date until one month after the return of the jury's verdict in the criminal trial.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on Amrep's appeal from orders issued by the District Court for the Southern District of New York (Pierce, J.) on November 3, 1975, and January 7, 1976, and on Amrep's appeal and the Federal Trade Commission's cross-appeal from an order issued by the District Court (Metzner, J.) on January 15, 1976.

FACTS

The FTC Complaint

On March 11, 1975, after an investigation lasting approximately two years, which commenced prior to the grand jury investigation in the Southern District, the Federal Trade Commission, "having reason to believe that Amrep Corporation . . . has violated the provisions of . . . [the Federal Trade Commission] Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest . . .", issued a complaint against Amrep in accordance with Section 5 of the Federal Trade Commission

Act, 15 U.S.C. §45 (5a-15a).[1/] The complaint charged Amrep, a land subdivider, with numerous unfair or deceptive acts or practices. Among the allegations were that the lots Amrep offered for sale were represented by Amrep as being an "excellent investment" when in fact they are "poor investments involving a substantial amount of financial risk to purchasers" (Complaint, ¶¶ 11, 12; 7a); that the "resale of a lot purchased from [Amrep] is not difficult," when in fact "there is virtually no resale market for lots purchased at [Amrep's] subdivisions" (Complaint, ¶¶ 13, 14; 8a); that its "subdivisions will, in the near future, be developed at least to the extent that all or most lots will be useable as homesites" when in fact Amrep's "subdivisions will not, in the near future, be developed to the extent that all or most lots will be useable as homesites, with potable water, septic tanks or central sewage" (Complaint, ¶¶ 24, 25; 9a); that the "Rio Rancho Estates area is attracting a substantial amount of new industry, and that purchasers who decide to move there will not have difficulty obtaining jobs" when in fact "jobs for new residents of Rio Rancho Estates are difficult to obtain unless the new resident decides to take either a substantial reduction in salary or a substantially different job, or both" (Complaint, ¶¶ 32, 33; 10a-11a). In addition the complaint alleged that documents purporting to describe the property were frequently made available by Amrep:

1/ Numbers followed by the letter "a" refer to pages in the printed Appendix. Numbers followed by the letter "b" refer to pages in the Supplemental Appendix attached to this brief.

> . . . at dinner parties or other gatherings sponsored by [Amrep] in circumstances where it is likely that many purchasers will not read such documents at all because they are insufficiently aware of their utility or significance, or it is likely that many purchasers will not read such documents carefully, completely or with full comprehension of their meaning and import. In many instances [Amrep] has withheld reports required to be provided to the purchaser by state or federal law until after an agreement is signed, which practice is in violation of federal or state laws. [Complaint, ¶ 46; 13a.]

These unfair or deceptive practices are alleged to be continuing ones. Additionally, the Commission alleged that these unfair or deceptive practices are prevalent in all of Amrep's subdivisions, not only at the Rio Rancho Estates subdivision which is the subject of the criminal indictment.

The proposed order accompanying the complaint requires Amrep to cease and desist from its deceptive practices; to disclose to prospective purchasers the risks involved in purchasing the land; and provides for a ten day period in which future purchasers could cancel their contracts (17a-35a). In addition, the proposed order advised Amrep that the Commission may seek restitution for defrauded purchasers under the consumer redress provisions of Section 19(b) of the Federal Trade Commission Act, 15 U.S.C. §57(b) (Supp. IV 1974) (17a).

Amrep's May 1975 Motion to the Commission and its Subsequent Motions Before Judge Pierce

After the FTC complaint was issued in March 1975, Commission counsel proceeded diligently with discovery requests looking towards an early trial date. During this time a grand jury was also investigating Amrep's practices with

respect to its activities in one of its subdivisions, Rio Rancho Estates. On May 27, 1975, Amrep moved before the Commission to stay the entire FTC proceeding pending the outcome of the grand jury investigation. Amrep alleged that adverse publicity from the FTC proceeding would prejudice its rights (38a-40a). On June 27, 1975, the Administrative Law Judge ("ALJ") denied Amrep's motion (55a-63a), which denial was affirmed by the Commission on July 29, 1975 (64a-65a).

On August 13, 1975, Amrep filed a civil complaint (75 Civ. 4013 (LWP)) seeking to reverse the July 29, 1975 order of the Commission denying Amrep's application for a stay of the Commission's proceedings pending the outcome of the grand jury's investigation (66a-67a). The Commission opposed Amrep's motion for a preliminary injunction staying the Commission's proceedings and also moved to dismiss the complaint (72a). On November 3, 1975, after the indictment was filed, Judge Pierce denied Amrep's motion as moot and also dismissed the complaint on the ground that it was moot (203a-204a). On December 31, 1975, Amrep filed a notice of appeal from these two orders (359a).

On October 28, 1975, a grand jury in the Southern District filed an indictment which named Amrep and some of its officers and directors as defendants (74a-115a). Judge Metzner is assigned to that case, which bears the Docket Number 75 Cr. 1023. At a conference on November 18, 1975, at which Amrep was represented by the Proskauer firm, as it is here, a firm trial date of October 5, 1976, was set (303a-

337a). This trial date, some eleven months after the indictment, was established at the request of Amrep's counsel, who did not inform Judge Metzner of the Federal Trade Commission trial, which had at that time been set to commence on February 17, 1976 (191a; 303a-337a).

On January 2, 1976, Amrep moved before Judge Pierce (75 Civ. 4013) for an order under Rule 60(b), Fed. R. Civ. P., vacating the District Court's order of dismissal of November 3, 1975, and for an order under Rule 65, Fed. R. Civ. P., issuing a preliminary injunction against the Commission. Judge Pierce denied both motions on January 7, 1976 on the grounds that (1) inasmuch as Amrep had appealed from the November 3 order, the court was ousted from jurisdiction; and (2) the grounds for Amrep's present motion were different from its earlier motion and if Amrep wished to be heard, it would have to file a new complaint (404a-405a; 416a-419a).

Amrep's Motion Before Judge Metzner and the Court's Decision of January 15

Concurrent with its application before Judge Pierce, Amrep also moved on January 2, 1976, before Judge Metzner (75 Cr. 1023) for an order to show cause why the Commission's proceedings should not be enjoined pending conclusion of the criminal trial. In lengthy papers filed with Judge Metzner, Amrep argued that the FTC proceeding should be stayed pending the

conclusion of the criminal trial principally because preparation for the FTC proceeding would interfere with Amrep's defense in the criminal proceeding; preparation for the criminal trial would interfere with Amrep's defense in the FTC proceeding; and Amrep had been unable to replace one of its four counsel in the FTC proceeding, Solomon Friend, who had been indicted. In the course of a full argument on the merits, it was pointed out to Judge Metzner that the criminal trial was then eight months away; that one proceeding would not interfere with the other; and that Amrep had been represented in the FTC proceeding by three other attorneys in addition to Mr. Friend, whose appearances had not been withdrawn. Considering the entire case on the merits, on January 15, 1976, Judge Metzner ordered that the Commission may proceed with discovery and trial through July 30, 1976,[2] but stayed all proceedings thereafter until one month following the entry of the jury's verdict in the criminal trial (479a-489a). On January 20, 1976, Amrep appealed from so much of Judge Metzner's order as permits the Commission proceeding to continue through July 30, 1976 (490a); and

2/ Amrep incorrectly asserts that Judge Metzner permitted the FTC to continue its proceeding until the earlier of the presentation of its case-in-chief or July 30, 1976 (Brief, p. 3). In fact, however, Judge Metzner stated "I direct that the Commission proceedings may continue with the presentation of the government's case-in-chief through July 30, 1976 (488a; emphasis added). In effect, Judge Metzner ruled that neither proceeding would interfere with the other prior to July 30, 1976.

on January 29, 1976, the Commission cross-appealed from that part of the order which stays the FTC proceeding subsequent to July 30, 1976 (1b-2b). By order dated January 27, 1976, this Court ordered a stay of the Commission proceeding pending an expedited appeal.

Amrep's December 1975 Motion to the Commission

On December 19, 1975, the last day provided by the ALJ for such an application, Amrep made a two-pronged motion to the ALJ. First, Amrep sought an immediate stay of all discovery in the Commission proceeding. Second, Amrep sought a stay of the entire Commission proceeding pending the conclusion of the criminal trial before Judge Metzner.

It should be noted that Amrep, by its counsel, agreed on October 30, 1975, after the indictment in the criminal case, to commence the hearing before the Commission on February 17, 1976 (191a). Pursuant to a request on behalf of Amrep, the hearing was rescheduled to March 29, 1976. Finally, as a result of the temporary stay issued by the District Court, the ALJ rescheduled the hearing date to April 12, 1976 (509a).

On December 29, 1975, the ALJ denied Amrep's application for an immediate stay of discovery (355a-356a). With regard to Amrep's motion before the ALJ that the entire proceeding be stayed, at the time of Amrep's motion in the District Court the ALJ had the motion to the Commission under consideration. Indeed,

the ALJ did not rule until January 15, 1976, at which time he denied Amrep's request that the entire proceeding be stayed, citing an abundance of legal precedents for his decision (495a-508a). In addition, the ALJ certified the question to the Commission pursuant to Rule 3.23(b) of the Commission's Rules of Practice (16 C.F.R. §3.23(b))(508a). As of this date, the full Commission has not yet ruled on the motion.

ARGUMENT

Preliminary Statement

Amrep seeks to enjoin an ongoing administrative proceeding, the legality of which was unquestioned in the District Court. The general rule is that courts will not intervene in a pending administrative proceeding except in extraordinary circumstances. Renegotiation Board v. Bannercraft, 415 U.S. 1 (1974); Myers v. Bethlehem Shipbuilding Corp. 303 U.S. 41 (1938); Pepsico, Inc. v. Federal Trade Commission, 472 F. 2d 179 (2d Cir. 1972); Sterling Drug, Inc. v. Weinberger, 509 F. 2d 1236 (2d Cir. 1975); Bristol-Myers Company v. Federal Trade Commission, 469 F. 2d 1116 (2d Cir. 1972); M.G. Davis & Co., Inc. v. Cohen, 369 F. 2d 360 (2d Cir. 1966); Seven-Up Co. v. Federal Trade Commission, 478 F. 2d 755 (8th Cir. 1973); Sears, Roebuck & Co. v. NLRB, 473 F. 2d 91 (D.C. Cir. 1973); Coca-Cola Company v. Federal Trade Commission, 475 F. 2d 299 (5th Cir. 1973); International Waste Controls, Inc.

v. S.E.C., 362 F. Supp. 117 (S.D.N.Y.) aff'd., 485 F. 2d 1238 (2d Cir. 1973).

The Second Circuit has recognized only two exceptions to the general abstention doctrine: first where the agency acts in clear excess of its powers and second where the plaintiff clearly sustains irreparable harm, cognizable as such in equity. Amrep has made no allegation in the District Court that the FTC is acting in excess of its jurisdiction. Any such allegation would fail in any event. Concurrent action by two agencies of government does not result in the stay of either. The same issues and parties may be proceeded against simultaneously by more than one agency. See, e.g., Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948); United States v. Borden Company, 347 U.S. 514 (1954).

Even if the first condition is met, the second may be required as well. M.G. Davis & Co., Inc. v. Cohen, supra, 369 F. 2d at 363; Pepsico, Inc. v. Federal Trade Commission, supra, 472 F. 2d at 187. Amrep has not even approached making a clear showing of irreparable harm, cognizable as such in equity, as will be demonstrated below.

It is well settled that a district court's denial of injunctive relief may be reversed only if such denial is found to be a clear abuse of discretion. Gresham v. Chambers, 501 F. 2d 687, 691 (2d Cir. 1974); Meccano, Ltd. v. John Wanamaker, 253 U.S. 136, 141 (1920); Deckert v. Independence Shares

Corp. 311 U.S. 282, 290 (1940); Galella v. Onassis, 487 F. 2d 986, 997 (2d Cir. 1973); First-Citizens Bank & Trust Co. v. Camp, 432 F. 2d 481 (4th Cir. 1970). Judge Metzner refused to enjoin the Commission proceeding through July 30, 1976. There has been no showing that such action constituted an abuse of discretion. "[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Delno v. Market St. Ry. Co., 124 F. 2d 965, 967 (9th Cir. 1942). See also, Beshear v. Weinzapfel, 474 F. 2d 127, 134 (7th Cir. 1973); O'Donnell Transp. Co. v. City of New York, 215 F. 2d 92, 95 (2d Cir. 1954).

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE FTC PROCEEDING TO CONTINUE THROUGH JULY 30, 1976.

A. Amrep has not met the burden necessary to obtain a stay of an agency proceeding.

Since a district court can intervene to enjoin a pending agency proceeding only in extraordinary circumstances, it obviously follows that the issuance of an injunction staying such proceedings is rare indeed. As this Court observed in United States v. Simon, 373 F. 2d 649, 652 (2d Cir. 1967), vacated on other grounds, 389 U.S. 425 (1969):

> No federal district court in a criminal case has ever enjoined a party to a civil action in another jurisdiction from litigating the civil action or taking testimony in it. . . .

The standards for determination of a request for injunctive relief to enjoin a duly authorized and proper action of an agency of the United States are well-settled in this, and in other, circuits. All such requests are addressed to the discretion of the court. As the Supreme Court stated in Yakus v. United States, 321 U.S. 414, 440 (1944):

> The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. . .

Before an injunction of an agency proceeding may be granted the party requesting such relief must make a strong showing of (1) probable success on the merits of its complaint; (2) irreparable injury cognizable as such in equity if the injunction is denied; (3) the lack of serious adverse effect on other persons if the requested relief is granted; and (4) the serving of the paramount public interest by the granting of the extraordinary relief requested. Virginian Ry. v. United States, 272 U.S. 658 (1926); Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4 (1942); Yakus v. United States, supra, 321 U.S. 414; Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission, 259 F. 2d 921 (D.C. Cir. 1958); Eastern Air Lines, Inc. v. Civil Aeronautics Board, 261 F. 2d 830 (2d Cir. 1958); First-Citizens Bank & Trust Co. v. Camp, supra, 432 F. 2d 481, 483.

Appellant is unable to satisfy any one -- let alone all -- of these universally recognized prerequisites.

1. Courts will not stay an ongoing administrative proceeding because of a pending criminal proceeding.

The District Court was clearly correct in permitting the Commission proceeding to continue. Amrep's involvement in both civil and criminal proceedings with the government is not unusual. Others in positions similar to Amrep's have tried to stay civil proceedings or otherwise complain of the pendency of both civil and criminal proceedings at the same time. From these cases has evolved a substantial and controlling body of law that criminal indictment does not give a defendant "a blank check to block all civil litigation on the same or related subject matter." Gordon v. Federal Deposit Insurance Corporation, 427 F. 2d 578, 580 (D.C. Cir. 1970).

There are often both criminal and civil remedies for the same wrongful conduct. Courts have rejected the argument that the government must choose between them, recognizing that each remedy has its own merits. In United States v. Kordel, 397 U.S. 1 (1970), the Supreme Court observed (at 11):

> The public interest in protecting consumers throughout the Nation from misbranded drugs, requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. . . . It would stultify enforcement of federal law to require a governmental agency such as the FDA. . . to defer civil proceedings pending the ultimate outcome of a criminal trial. (Emphasis added.)

A similar observation was made in Gordon v. Federal Deposit Insurance Corporation, supra, 427 F. 2d 578, where a criminal defendant sought to stay the collection in a civil action by the FDIC of certain monies owed by the defendant. The Court of Appeals stated (at 580):

> . . . [T]he fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter. Justice is meted out in both civil and criminal litigation. The overall interest of the courts that justice be done may very well require that the compensation and remedy due a civil plaintiff should not be delayed (and possibly denied). The court, in its sound discretion, may assess and balance the nature and substantiality of the injustices claimed on either side. (Emphasis added.)

Applying a similar balancing test, the Second Circuit in United States v. Simon, supra, 373 F. 2d 649, reversed a district court's order staying depositions of a defendant, in a case brought by a bankruptcy trustee, which concerned facts involved in a pending and related criminal case. This Court stated (373 F. 2d at 652):

> Under these circumstances, the public interest in the progress of the Eastern District action clearly outweighs the appellees' interest in withholding their testimony until after the Southern District trial without invoking their privilege against self-incrimination.

See also, DeVita v. Sills, 422 F. 2d 1172 (3d Cir. 1970),. in which the Court refused to stay a judicial inquiry directed to the defendant's disbarment and removal from judicial office pending the resolution of a criminal indictment, noting the "serious public prejudice which would occur in this case by a delay in the determination of the plaintiff's status. . ." (422 F. 2d at 1178). And see, Gellis v. Casey, 338 F. Supp. 651 (S.D.N.Y. 1972), where the court denied a motion to stay an SEC proceeding during the pendency of a criminal investigation.

The specific problem raised by Amrep is the possibility that the government in the criminal case will obtain evidence as a result of the FTC proceeding. That argument has been rejected as a basis for the issuance of a stay of the civil proceeding. United States v. Kordel, supra, 397 U.S. 1; DeVita v. Sills, supra, 422 F. 2d 1172; United States v. American Radiator & Standard Sanitary Corporation, 388 F. 2d 201, 204 (3d Cir. 1967), cert. denied, 390 U.S. 922 (1968); United States v. Simon, supra, 373 F. 2d at 652.

Appellant cites several cases which are inapposite: Silver v. McCamey, 221 F. 2d 873 (D.C. Cir. 1955); Campbell v. Eastland, 307 F. 2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963); and United States v. Hasiwar, 299 F. Supp. 1053 (S.D.N.Y. 1969). Each of these cases was decided before the Supreme Court's decision in Kordel, supra, 397

U.S. 1 (1970). In addition, Campbell v. Eastland involved an effort by a defendant to use civil discovery to obtain disclosure of the government's evidence in a criminal trial. This is clearly irrelevant to the question of whether a court can stay an ongoing and lawful administrative proceeding conducted pursuant to statute, in the public interest. In United States v. Hasiwar, supra, the only witnesses who could testify on behalf of the defendants were themselves defendants in a related narcotics case. Defendants argued that since the witnesses would invoke their Fifth Amendment privileges against self-incrimination, the "fair administration of criminal justice" required that the "trial be delayed until a disposition is reached in the case against their only prospective witnesses" (299 F. Supp. at 1056). As will be demonstrated below, appellant has made no showing that the indicted officers and directors are the only individuals who can testify on behalf of the corporation. Indeed, besides many knowledgeable employees of Amrep who could testify and who were not indicted, there are no less than two vice-presidents, the treasurer, secretary and five directors of the corporation who were not indicted (502a-504a). The facts therefore clearly distinguish the instant case from Hasiwar.[3/]

3/ Furthermore, the privilege against self-incrimination does not shield corporate records from discovery even though such documents may also tend to incriminate individual officers. United States v. White, 322 U.S. 694, 700-01 (1944).

2. Amrep's argument that it is without adequate counsel and cannot properly defend itself in the FTC proceeding must await review by a Court of Appeals if, and when, a cease and desist order has been issued.

In its January 1976 motions before the District Court, Amrep argued that a stay was required principally because the FTC proceeding would interfere with the criminal proceeding and that Amrep was without adequate representation and could not properly defend itself in the FTC proceeding. With respect to the first contention, we have already demonstrated that civil proceedings will not be stayed because of concurrent criminal proceedings. In addition, Judge Metzner, the judge in the criminal proceeding, specifically found that at least through July 30, 1976, Amrep's involvement in the administrative proceeding would not interfere with its defense in the criminal proceeding.

While Amrep now argues that Judge Metzner was only interested in preventing interference with the criminal case and "did not pass upon the fairness and validity of the FTC proceeding" (Brief, p. 3), it must be noted that appellant presented identical motion papers to both Judge Pierce and Judge Metzner. Nowhere in Amrep's motion papers or in its oral argument before Judge Metzner did Amrep argue that Judge Metzner's jurisdiction extended only to prevent interference with the criminal trial. Indeed, there was extensive oral argument by Amrep's counsel with respect to its alleged lack of counsel and its inability to defend itself

in the FTC proceeding (469a-473a). If, as Amrep argues, Judge Metzner was to be concerned only with the FTC proceeding's interference with the criminal trial, one wonders why Amrep presented to Judge Metzner arguments with respect to alleged "infirmities" in the FTC proceeding.

Indeed, it appears that Judge Metzner was not aware of the limitation Amrep would place on him. In his opinion, Judge Metzner specifically referred to the fact that Solomon Friend, who had represented Amrep in the FTC proceeding, had been indicted; that Amrep retained new counsel in the FTC proceeding, which counsel then requested a one-month extension of the discovery and trial schedule previously established; and that such extension was granted by the ALJ (483a). Considering all of these factors, Judge Metzner stated (487a-488a):

> Consequently, I see no reason to interfere with the schedule set up by the administrative law judge through the completion of the government's case-in-chief, assuming that it ends on schedule or shortly thereafter. . . .
>
> Therefore, I direct that the Commission proceedings may continue with the presentation of the government's case-in-chief through July 30, 1976.

It would thus appear that Judge Metzner <u>did</u> decide that not only was there no immediate interference with the criminal trial but in addition Amrep's allegations of unfairness in the FTC proceeding were without merit.

Amrep argues that it is without adequate counsel in the FTC proceeding. The record, however, shows to the contrary. Prior to the indictment, Amrep had been represented in the

FTC proceeding by four attorneys, Solomon H. Friend, Theodore R. Schreier, I. David Parkoff and David Waldman (40a, 118a). Indeed, in several of the documents designated by appellant to be included in the printed Appendix, Mr. Schreier plays a particularly important role. Thus, the affidavit in support of Amrep's May 27, 1975 motion before the Commission, well before the indictment, is the affidavit of Mr. Schreier (41a-50a). The affidavit displays Mr. Schreier's intimate knowledge of the FTC proceeding, beginning as early as the commencement of the FTC investigation in May 1973 (41a-42a). In addition, the complaint in 75 Civ. 4013 filed August 13, 1975 and the Notice of Motion dated August 20, 1975 were both signed by Mr. Schreier (67a-71a).

Amrep argues that the indictment of Mr. Friend left it without counsel.[4/] This is hardly the case. Amrep continued to have three attorneys, highly experienced in the matter at hand, continuing to represent it in the FTC proceeding. Amrep has cited no cases which stand for the proposition that the elimination of one member of a four-member team of coun-

4/ Amrep suggests that Mr. Schreier's agreement at the October 30, 1975 conference with the ALJ to a February 17, 1976 trial date for the FTC proceeding (191a) should be given little weight because the conference took place "barely 48 hours after the indictment" of Mr. Friend (Brief, p. 14). As we have indicated, however, Mr. Schreier was fully familiar with the case, had previously played a leading role and was perfectly able to represent, and indeed did represent, Amrep at the conference.

sel is such an "extraordinary circumstance" which will authorize a federal court to stay a lawful and ongoing administrative proceeding of a United States government agency.

Indeed, if Amrep believed the assistance of its fourth attorney, Mr. Friend, was indispensible, it had ample time to retain additional counsel. As Judge Metzner pointed out (470a), Mr. Friend knew that he was a target of the grand jury investigation well in advance of the indictment. Furthermore, in November 1975, upon application by the Proskauer firm, one month's additional time was granted to such firm by the ALJ to familiarize themselves with the case. As stated by this Court in United States v. DiStefano, 464 F. 2d 845, 846 (2d Cir. 1972), "the Sixth Amendment right to counsel does not include the right to a lawyer whose other engagements prevent a speedy trial." Also, in United States ex rel. Carey v. Rundle, 409 F. 2d 1210 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970), a defendant in a criminal proceeding was afforded by the court an additional month to obtain private counsel to prepare his defense. The Court of Appeals, in holding that the district court did not abuse its discretion, stated (409 F. 2d at 1215): "one month is not a constitutionally inadequate time period in which to obtain counsel and prepare a defense. . . ." The Court further observed (409 F. 2d at 1214):

> Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of . . . justice.

If in a criminal trial, one month's additional time for counsel to familiarize itself with the case was held sufficient, certainly in an administrative proceeding the same holds true.

The complaint in the FTC action was brought under Section 5 of the FTC Act, 15 U.S.C. §45. Jurisdiction to review proceedings brought under Section 5 is "exclusively" conferred by Section 5(d) upon courts of appeals, upon entry of a cease and desist order issued by the Commission. If Amrep is indeed harmed by the fact that one of its four counsel is no longer representing it before the Commission or that, because of pressures exerted by a concurrent criminal proceeding, it may have more difficulty in presenting its defense than it may otherwise have had,[5] in the event a cease and desist order is ultimately issued by the

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5/ Amrep argues that because of the pending criminal case it is impossible for it to respond to FTC discovery demands and participate in FTC hearings (Brief, p. 3). In the first place, different attorneys are working on the two cases. In the criminal proceeding, George G. Gallantz, Esq. of the Proskauer firm is the partner in charge of the defense (303a). In the FTC proceeding, Messrs. Schreier, Parkoff and Waldman represent Amrep and in this litigation, Morton M. Maneker, Esq., assisted by several other attorneys, is representing Amrep (403a). In addition, as stated in the affidavit of Edward B. Winslow, sworn to January 26, 1976, and presented to this Court at the hearing on the motion for stay pending appeal, the firm of Jacobs, Persinger & Parker has served as outside counsel to Amrep since 1968. Judge Metzner was fully aware of Amrep's argument and stated (486a-487a):

Commission, Amrep will then have ample opportunity to challenge the alleged infirmities, in a court of appeals, pursuant to the procedures provided by Section 5.

It is well settled, that when Congress has provided a method for judicial review, that method ordinarily precludes other methods of review. See, Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752 (1947); Far East Conference v. United States, 342 U.S. 570 (1952). As the Court of Appeals summarized the rule concerning the very statutory review procedure applicable here, "the right to review afforded" by Section 5(c) of the Federal Trade Commission Act to "the Circuit Court of appeals constitutes a 'plain, speedy, and adequate remedy at law,' and is a bar to the remedy

5/ Cont'd

> . . . I cannot conceive that all of the individual defendants are going to be so tied up in the next two weeks that they cannot comply with the directives in the Commission proceedings. . . . After the defendants' motions are filed, there will be seven weeks in which day-to-day work will not be necessary awaiting the government's answers, and several weeks thereafter awaiting decision on those motions and such discovery as the court may permit. Thus, there is no substantial conflict through the first month of the projected trial schedule of the government's case-in-chief before the administrative law judge.
>
> While a large number of witnesses have been designated to be called by the government in the Commission proceeding, the aid of all of the individual defendants will not be necessary to prepare the cross-examination of such witnesses. (Emphasis added.)

by injunction. Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160." Royal Baking Powder Co. v. Federal Trade Commission, 32 F. 2d 966, 968 (D.C. Cir. 1929), cert. denied, 280 U.S. 472 (emphasis added).

Appellant presents no circumstances warranting a departure from the ordinary rule which requires exhaustion of Section 5 procedures. Since Section 5 provides a plain, adequate, complete and exclusive remedy to test the validity of any adverse order that may ultimately be issued by the Commission in the pending administrative proceeding, this Court is without jurisdiction to by-pass the exclusive statutory jurisdiction provided by Congress and to inject premature and extraordinary directions concerning the administrative proceedings. Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160 (1927); Miles Laboratories v. Federal Trade Commission, 140 F. 2d 683 (D.C. Cir. 1944), cert. denied, 322 U.S. 752; McFadden Publications, Inc. v. Federal Trade Commission, 37 F. 2d 822 (D.C. Cir. 1930); Royal Baking Powder Co. v. Federal Trade Commission, supra. See, City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 335-336 (1958).

Thus, the District Court was clearly correct in permitting the FTC proceeding to continue. Appellant has made no showing that the court abused its discretion. Absent such showing, the court's order allowing the Commission proceeding to continue through July 30, 1976, must be affirmed.

3. Amrep will not suffer irreparable harm if a stay is not granted.

Amrep likewise cannot demonstrate that it will suffer irreparable harm, cognizable as such in equity, if the Commission proceeding goes forward.

Amrep's argument that the indictment of one of its four counsel, Mr. Solomon Friend, leaves it without representation in the Commission proceeding and unable to comply with discovery requirements is patently without foundation. As pointed out above, Amrep has three other attorneys who have been representing the corporation before the Commission and for whom compliance with Commission discovery would not be unduly burdensome.

Amrep's further contention that the assistance and testimony of its indicted officers will be unavailable to the corporation if the Commission proceeding precedes the criminal trial is similarly without merit. Amrep has given no assurance that these officers will ever testify in the Commission proceeding, nor has Amrep adequately demonstrated that other officials could not provide effective assistance in its behalf. As detailed in the ALJ's decision of January 15, 1976, there are high ranking officials of the corporation who have not been indicted, including two vice-presidents, the treasurer, secretary and no less than five directors (502a-504a).

Finally, Amrep argues that requiring it to participate in the FTC proceeding will result in its revealing its defenses to the United States Attorney's office in the criminal case (Brief, p. 4). Such objections have been rejected by the courts. United States v. American Radiator & Standard Sanitary Corp., supra, 388 F. 2d 201, 204; United States v. Simon, supra, 373 F. 2d 649, 652. In addition, in the event such action becomes necessary, Section 3.45 of the Commission's Rules of Practice, 16 C.F.R. § 3.45, permits the ALJ to receive documents and testimony in camera in appropriate instances.

4. A stay would harm the Commission in the conduct of its investigation and would harm the victims of the alleged deceptive practices.

As stated above, any "harm" to Amrep is not irreparable. On the other hand, to permit further delay in the Commission's administrative proceeding would seriously undermine the Commission's law enforcement efforts to carry out its statutory duties. Amrep is seeking a stay of the Commission proceeding until the conclusion of the criminal trial. It is likely that the criminal trial will not be concluded before early 1977. Thus, Amrep is asking this Court to stay the Commission proceeding for a period of one year or more. Such a stay of a lawful FTC proceeding would not only harm the Commission in carrying out its statutory duties but would add

another twelve months or more to the time during which the victims of the alleged deceptive practices, the consuming public, must remain unprotected. As this Court stated in Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 216 (2d Cir. 1942), aff'd., 317 U.S. 501 (1943):

> The importance of promptness as well as adequacy in administrative investigations. . . both of specific statutory violations and of the general administration of legislation, is more fully recognized by the courts today as an indispensable condition of the effective enforcement of remedial social legislation. . . .

Moreover, since issuance of a final cease and desist order by the Commission must precede the exercise of the Commission's authority to seek consumer redress under Section 19 of the Federal Trade Commission Act (15 U.S.C. §57(b), as amended Pub. L. No. 93-637, § 206 (1975)), any further stay of the Commission's proceeding would have the effect of delaying the exercise of the Commission's consumer redress authority on behalf of victims of the alleged deceptive practices.

Amrep argues that the Commission's "leisurely prosecution of the Amrep matter" and its failure to seek an injunction and permit the case to "lie dormant for nine months" belies the Commission's argument against a stay (Brief, p. 6).

Amrep's argument of the Commission's "leisurely" pace is astounding when one considers a further argument of Amrep concerning In the Matter of Horizon Corporation, Docket No. 9017. At page 52 of its brief Amrep argues that the

Commission is acting too diligently with respect to Amrep when in a case involving another land sales company "there has been no discussion whatsoever with respect to the fixing of hearing dates." This is the first mention of the Horizon matter by appellant. The law is well settled that a reviewing court should not entertain questions which were not previously raised before the agency or the court below. Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411, 414 (1958); United States v. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952); Fortunato v. Ford Motor Co., 464 F. 2d 962, 967 (2d Cir. 1972), cert. denied, 409 U.S. 1038. In addition, the Commission in its discretion proceeds against respondents in the fashion it deems best, and indeed can even proceed against one company and not against a competitor. See, Moog Industries, supra, 355 U.S. at 412; Federal Trade Commission v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967).

With respect to appellant's contention that the Commission should have previously moved for an injunction, the Supreme Court, in Moog Industries, supra, disposed of the argument (355 U.S. at 413):[6/]

> . . . [T]he Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.

6/ Contrary to Amrep's argument, inasmuch as Section 13(b) of the FTC Act (15 U.S.C. §53) requires the complaint to be issued within 20 days of the issuance of the injunction, the earliest time at which the Commission could have sought a preliminary injunction was the time the administrative complaint was issued. In such case the Commission must make a sufficient showing to convince the court that the preliminary injunction should be issued. Amrep does not explain why it would not object to defending itself against an action for a preliminary injunction but does object to defending itself in the administrative proceeding.

One of the Commission's goals in its proceeding against Amrep is restitution for the alleged defrauded purchasers of land, pursuant to the consumer redress provisions of the FTC Act. Section 19 of the Act (15 U.S.C. § 57), which contains the provisions with respect to consumer redress, applies only after "the Commission has issued a final cease and desist order." Such an order is issued, in accordance with Section 5 of the Act, after a full administrative hearing. To the extent that Commission staff would have been occupied with injunction proceedings, it would have delayed their prosecution of the administrative hearing, and in turn would have delayed the opportunity to seek consumer redress. In sum, the public interest is best served by a speedy trial rather than by seeking interim injunctive relief.

Finally, Amrep asserts there was a "nine month" delay prior to the issuance of the complaint (Brief, p. 6). Amrep does not spell out its evidence that there was such a delay. Presumably it counts the nine months from the time it made a motion to the Commission to stay proceedings on June 12, 1974 (42a) until the issuance of the Commission's complaint on March 11, 1975 (5a-15a). The short answer to appellant's argument is, that while Amrep may not have been asked for information during that time period, the Commission was diligently reviewing the fruits of its investigation. Surely, Amrep would not have wanted the Commission to have acted in haste in determining whether to issue a complaint against it.

Thus, for the above reasons, the stay should be denied. A stay would harm the Commission in the conduct of its

investigation, which it has diligently been pursuing and would in turn harm the victims of the alleged deceptive practices.

5. It would be against the public interest to grant a stay.

The weight to be given the public interest as opposed to private detriment was established in Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission, supra, 259 F. 2d at 925:

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.

The Commission, as required by 15 U.S.C. §45(b), has issued a complaint against Amrep after concluding that a proceeding "would be in the public interest." Indeed, the Commission is presumed to act in the public interest. Federal Trade Commission v. Klesner, 280 U.S. 19 (1929). Hence, the primary responsibility for determining the public interest rests with the Commission; and the Court, in considering a stay, should not substitute its judgment for that of the Commission. Associated Securities Corp. v. Securites and Exchange Commission, 283 F. 2d 773 (10th Cir. 1960). As the Supreme Court stated in Scripps-Howard Radio, Inc. v. Federal Communications Commission, supra, 316 U.S. 4, 15:

> Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest.

Amrep suggests that the public interest would be served were the FTC proceeding to be stayed and "appropriate use" would be made "of the criminal transcript as evidence in the FTC case" (Brief, p. 33). While no doubt some testimony in the criminal proceeding might be useful in the FTC proceeding, such testimony could only supplement the FTC proceeding but could clearly not be a substitute for a full administrative hearing. The allegations in the FTC complaint differ from the counts in the indictment. The purpose and scope of relief of Section 5 of the Federal Trade Commission Act differ from the purpose and scope of relief of the criminal statutes involved in the indictment. In addition, the FTC complaint covers all of Amrep's subdivisions; whereas the indictment only deals with Rio Rancho Estates. Finally, it is well settled that "administrative agencies like the Federal Trade Commission have never been restricted by . . . rigid rules of evidence. . . . [R]ules which bar certain types of evidence in criminal. . . cases are not controlling. . . ." Federal Trade Commission v. Cement Institute, supra, 333 U.S. at 705-06. See also, Buchwalter v. Federal Trade Commission, 235 F. 2d 344, 346 (2d Cir. 1956); School Board of Broward County, Florida v. HEW, 525 F. 2d 900, 905 (5th Cir. 1976).[7]

[7] Because of differences between the two proceedings in the issues involved, the burden of proof which has to be met and the evidentiary rules, it is possible for different results to be reached in each case. The public interest in stopping the alleged deceptive practices and redressing consumer injury is equally as great as the public interest in enforcing the criminal statutes.

For the above reasons, it is submitted that the granting of a stay of the FTC proceeding would be against the public interest.

II. THE DISTRICT COURT ERRED IN ORDERING A STAY OF THE COMMISSION PROCEEDINGS FROM JULY 30, 1976, UNTIL ONE MONTH AFTER RETURN OF THE JURY'S VERDICT IN THE CRIMINAL TRIAL.

As was pointed out above, courts will not stay a lawful and ongoing administrative proceeding because of a pending criminal proceeding. United States v. Kordel, supra, 397 U.S. 1; United States v. Simon, supra, 373 F. 2d 649.

The criminal trial in which Amrep is a defendant is scheduled to begin October 5, 1976. Yet, the District Court stayed the Commission proceeding for a period beginning more than two months prior to the scheduled start of the criminal trial and continuing for a period ending one month after the return of the jury's verdict. There is no warrant in the applicable cases for such a procedure.

Counsel for Amrep argued before Judge Metzner that the FTC proceeding would interfere with the defense of the criminal proceeding. Counsel admitted, however, that they were not contending that they were unable to handle both proceedings simultaneously (426a). Indeed, Mr. George Gallantz is lead counsel in the criminal proceeding while Mr. Morton Maneker is lead counsel in this action (303a, 422a). Presumably, Amrep's argument

is that when the criminal trial commences, the same witnesses may be scheduled to appear at the same time at both the FTC trial and the criminal trial. There are several answers to this hypothetical dilemma. In the first place, the FTC trial may be concluded by October 5, 1976. Even if it is not, the greater portion of the trial will certainly be over. Since the FTC proceeding involves all of Amrep's subdivisions, whereas the criminal proceeding involves only the Rio Rancho Estates, FTC counsel could schedule the case so that witnesses who may be called upon to appear as witnesses in the criminal trial could be called in the FTC proceeding well in advance of October 5, 1976. Finally, were an actual conflict to arise in the scheduling of a witness, application could be made to the ALJ. In the unlikely event that a satisfactory result could not be obtained, application could then be made to the judge presiding at the criminal trial.

We submit that the District Court's stay of the Commission proceeding - <u>eight months prior to the start of the criminal trial</u> - was premature. There was no way to forecast, in January, problems which may arise in October. If such problems do arise, both the Commission and the criminal court are well equipped to handle those problems - <u>at the time they arise</u> - rather than by a blanket prohibition against all proceedings.

Inasmuch as the cases clearly hold that civil proceedings will not be stayed because of concurrent criminal proceedings and in view of the fact that appellant has not met the criteria necessary for the issuance of a stay of a lawful administrative proceeding, we submit that the District Court erred in ordering a stay of the Commission proceeding from July 30, 1976, until one month after the return of the jury's verdict in the criminal trial.

III. JUDGE PIERCE CORRECTLY DECIDED THE MOTIONS BEFORE HIM.

Amrep argues that Judge Pierce incorrectly dismissed the corporation's initial motion as moot and incorrectly refused to reverse his decision and issue a preliminary injunction against the Commission proceeding.

On August 13, 1975, Amrep filed a civil complaint (66a-69a) and on August 20, 1975, filed a motion for a preliminary injunction staying the Commission proceeding (70a-71a). The ground for the motion was primarily that adverse publicity arising out of the FTC proceeding may prejudice Amrep's rights before the grand jury (Memorandum of Law in Support of Motion for a Preliminary Injunction). On November 3, 1975, after the indictment was filed, inasmuch as there was no longer the possibility that adverse publicity could prejudice the members of the grand jury, Judge Pierce dismissed the complaint and

denied the motion for a stay of the Commission proceeding. Judge Pierce was clearly correct in so deciding. The principal ground for relief on which appellant relied was no longer applicable. As pointed out above, a district court's denial of injunctive relief may be reversed only if found to be a clear abuse of discretion. See, Gresham v. Chambers, supra, 501 F. 2d 687 and other cases cited on pages 10-11.

On December 31, 1975, Amrep filed a Notice of Appeal from the order of Judge Pierce dated November 3, 1975. Yet on January 2, 1976, Amrep moved before Judge Pierce for an order under Rule 60(b), Fed. R. Civ. P., vacating the November 3 order and for an order under Rule 65, Fed. R. Civ. P., issuing a preliminary injunction against the Commission. On January 7, 1976, Judge Pierce correctly denied both motions on two grounds (416a-418a):

> I note first that the filing of a notice of appeal in the civil action in this Court's view clearly deprives the Court of jurisdiction to enter an order under Rule 60(b). See Weiss v. Hunna, 312 F. 2d 711 (2d Cir. 1963). But even if for some reason this were not so, the present application in the Court's view is not properly within the context of 75 Civil 4013.
>
> The earlier civil action was brought as an appeal from the decisions of an administrative law judge and the Federal Trade Commission dated June 27, 1975, and July 29, 1975, respectively, and those decisions denied Amrep's application for a stay of the FTC investigation during the pendency of the criminal investigation then going on. The relief sought in the civil action was a stay of the FTC proceedings "during the pendency of the criminal investigation." In essence, the basis for the relief sought was that publicity from the civil FTC investigation might prejudice the ongoing criminal investigation. . . .

> The present application seeks an injunction against further prosecution of the FTC proceeding until conclusion of the trial of the criminal case before Judge Metzner. Thus, different relief is sought from that which was sought in 75 Civ. 4013.
>
> Finally, the basis for the present application is that the conflict between the two proceedings, the civil FTC investigation and the criminal trial before Judge Metzner, makes it impossible for Amrep to proceed adequately with both actions at the same time. Thus, the basis for the relief sought is also different from that originally presented in 75 Civ. 4013.
>
> Having considered all of these factors, I adhere to my original decision dismissing the civil action 75 Civ. 4013 as moot, and nothing presented here convinces me that that action was not then or is not now moot. Rather, it appears to me that Amrep has a new grievance which, if it is to be pursued at all, should be pursued by means of a new civil action in this court.

Judge Pierce was clearly correct. Having filed a Notice of Appeal, Amrep divested the District Court of power to grant the relief sought. As summarized by Professor Moore (9 Moore's Federal Practice §203.11 at 734-36 (1975)):

> The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any matters involved in the appeal. It divests the district court of authority to proceed further with respect to such matters, except in aid of the appeal, or to correct clerical mistakes under Rule 60(a) of the Federal Rules of Civil Procedure or Rule 36 of the Federal Rules of Criminal Procedure, or in aid of execution of a judgment that has not been superseded, until the district court receives the mandate of the court of appeals. Thus, after a notice of appeal is timely filed, the district court has no power to vacate the judgment, or to grant the appellant's motion to dismiss the action without prejudice. . . .

This Court in Weiss v. Hunna, 312 F. 2d 711 (2d Cir. 1963), in an opinion written by Judge Friendly, specifically held that once a notice of appeal has been filed, the District Court has no jurisdiction to grant a motion made pursuant to Rule 60(b), Fed. R. Civ. P. The Court stated (312 F. 2d at 713):

> But once plaintiff had filed a notice of appeal, the district court was divested of jurisdiction to grant or deny relief under either Rule 59 or Rule 60(b) except with our permission. Freedman v. Overseas Scientific Corp., 150 F. Supp. 394 (S.D.N.Y. 1957); Ritter v. Hilo Varnish Corp., 186 F. Supp. 625 (S.D.N.Y. 1960); Daniels v. Goldberg, 8 F.R.D. 580 (S.D.N.Y. 1946), aff'd. 173 F. 2d 911 (2 Cir. 1949); 7 Moore, Federal Practice (2d ed. 1953), at 335-338.

Appellant cites Ryan v. United States Lines Co., 303 F. 2d 430, 434 (2d Cir. 1962) for the proposition that "the district court is first to determine whether it would grant the motion" (Brief, p. 41). Indeed, Judge Pierce in fact followed that procedure. He determined that he would deny the motion on the ground that "the relief sought in the present application is entirely different from that which was sought in 75 Civ. 4013" (404a-405a).

In addition, again in its January 2 motions, Amrep was seeking a stay of the FTC proceeding. The District Court's denial of the stay may be reversed only if found to be a clear abuse of discretion. There was no such abuse of discretion. See Gresham v. Chambers, supra, 501 F. 2d 687, 691; Meccano Ltd. v. John Wanamaker, supra, 253 U.S. 136, 141; O'Donnell Transp. Co. v. City of New York, supra, 215 F. 2d 92, 95.

Finally, Amrep can show no prejudice as a result of Judge Pierce's orders. For Judge Metzner did in fact assume jurisdiction and considered Amrep's entire motion on the merits.

CONCLUSION

The Supreme Court and this Court have clearly held that a lawful and ongoing administrative proceeding should not be stayed because there is also a pending criminal proceeding. If a stay is granted in this case, the FTC proceeding would be stopped in its tracks for over a year. Appellant has not made the strong showing necessary for the Court to undertake such drastic action.

Wherefore, it is respectfully submitted that Amrep's appeals be denied and that the Federal Trade Commission's cross-appeal be granted.

ROBERT J. LEWIS
General Counsel

GERALD P. NORTON
Deputy General Counsel

GERALD HARWOOD
Assistant General Counsel

D. BARRY MORRIS
CHARLES F. PLATT
Attorneys

Attorneys for the Federal Trade Commission

Washington, D.C. 20580

February 12, 1976

SUPPLEMENTAL

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. AMREP CORPORATION, et al., Defendants.	75 Cr. 1023 (CMM) NOTICE OF CROSS-APPEAL

Notice is hereby given that the Federal Trade Commission hereby cross appeals to the United States Court of Appeals for the Second Circuit from so much of the order entered herein on January 15, 1976, which enjoins proceedings in the Matter of Amrep Corporation, presently pending before the Federal Trade Commission (Docket No. 9018) after July 30, 1976, until one month after the entry of the jury's verdict in the criminal trial herein.

Dated: Washington, D.C.
January 29, 1976

D. Barry Morris

D. Barry Morris
Office of General Counsel
Federal Trade Commission
6th Street & Pennsylvania Ave., N.W.
Washington, D.C. 20580

TO:

Morton M. Maneker, Esq.
Proskauer Rose Goetz & Mendelsohn
Attorneys for Defendents
Amrep Corporation, Rio Rancho
Estates, Inc., and ATC Realty
Corp.
300 Park Avenue
New York, New York 10022

Thomas J. Cahill
United States Attorney
Southern District of New York
One St. Andrews Plaza
New York, New York 10007

Mark S. Arisohn, Esq.
Stanley S. Arkin, P.C.
Attorneys for Howard W. Friedman
and Henry L. Hoffman
300 Madison Avenue
New York, New York 10017

Robert S. Kasanof, Esq.
Attorney for Herman B. Oberman
460 Park Avenue
New York, New York

Jack Hoffinger, Esq.
Hoffinger, Friedland & Ross
Attorneys for Irving W. Blum
10 East 53rd Street
New York, New York

Guy Quinlan, Esq.
Rogers & Wells
Attorneys for Solomon H. Friend
200 Park Avenue
New York, New York 10017

John Sprizzo, Esq.
Curtis, Mallet-Prevost, Colt & Mosle
Attorneys for Daniel Friedman
and Chester Carity
100 Wall Street
New York, New York 10005

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Acting Chairman
Elizabeth Hanford Dole
Stephen Nye

In the Matter of AMREP CORPORATION, a corporation.	DOCKET NO. 9018 ORDER

In accordance with the suggestion of the Court in United States v. Amrep Corp., 75 Cr. 1023 (S.D.N.Y.), that the Commission might apply for a preliminary injunction under Section 13(b) of the Federal Trade Commission Act */, the Commission directs complaint counsel to consider whether a preliminary injunction should be sought. In the event that complaint counsel so conclude, they should make a motion, on notice to respondent, requesting the Commission to take such action.

IT IS SO ORDERED.

By the Commission.

SEAL

Chas. A. Tobin
Charles A. Tobin
Secretary

ISSUED: January 27, 1976

*/ Opinion, dated January 15, 1976, pp. 10-11.

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMREP CORPORATION, Appellant, v. FEDERAL TRADE COMMISSION, Appellee.	76-6008 76-6013
UNITED STATES OF AMERICA v. AMREP CORPORATION, et al., Defendants, FEDERAL TRADE COMMISSION, Cross-Appellant.	76-1028

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of February 1976 served the Brief for Federal Trade Commission, Appellee and Cross-Appellant, upon Appellant and Cross-Appellee, Amrep Corporation, by hand-delivering copies thereof to the office of counsel for Amrep Corporation, Morton M. Maneker, Esq., Proskauer, Rose, Goetz & Mendelsohn, 300 Park Avenue, New York, New York, 10022.

D. Barry Morris

D. Barry Morris
Attorney, Federal Trade Commission
Washington, D.C. 20580